IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition No. 2433 of 1994

1. Sri Swami Vivekananda Shikshan
Sanstha,Kolhapur
2. Secretary,
Sri Swami Vivekanand Shikshan
Sanstha, Kolhapur ... Petitioner

V/s

1. Divakar Vishnupant Bhore
2. Sri R.R.Bhavsar,
Presiding Officer, School
Tribunal, Pune ... Respondents

Shri P.D.Dalvi for the Petitioner
Smt.R.R.Salvi for Respondent no.1
Respondent no.2 is formal party.

CORAM : S.R.SATHE,J.
DATED : 18th December 2006

JUDGMENT :-

1. By this petition under Article 226 of the Constitution of India, the Petitioners have challenged the order passed by the Presiding Officer, School Tribunal, Pune in appeal No.22 of 1987, whereby, the order of termination of services of Respondent no.1 passed by the Petitioners on 12-2-1987 was quashed and it was declared that Respondent

no.1 continues in employment with all consequential benefits.

2. Brief facts giving rise to this writ petition are as follows :

. Petitioner no.1 Shri Swami Vivekanand Shikshan Sanstha Kolhapur was running several Secondary schools in the State of Maharashtra. Petitioner no.2 is the Secretary of the said Sanstha. Respondent no.1 Diwakar Bhore was in the employment of Petitioner no.1 as an assistant teacher from 1965. He was transferred to Venna Vidya Mandir Medha,Taluka Jaoli, District Satara. with effect from 14-6-1977 and since then he was working in the said school. Respondent no.1 proceeded on leave from 1-12-1977 on the ground of his sickness. However, from 14-12-1977 there was a strike of Government servants, teachers and non teaching staff of the schools and as at that time Respondent no.1 was President of the Secondary School Association he cancelled his leave from 14-12-1977 and informed the Petitioners Sanstha through the Head master of Venna Vidya Mandir, Medha, Taluka Jaoli that his leave be cancelled from 14-12-1977 and it be treated that he has participated in the strike.

3. The strike was called off on 11-2-1978. Respondent no.1 therefore went to his school to resume duties. The management, however, did not permit him to join. He,

therefore, made a complaint to the Education officer,Zilla Parishad, Satara. Thereafter as per the directions of Education Officer, Zilla Parishad, Satara he resumed duties and signed the muster roll upto 9-3-1977. However, from 10-3-1977 Respondent no.1 was not allowed to sign the muster roll, even though he was attending the school. In the Muster he was shown as absent. Respondent n.1 therefore, filed a suit bearing Civil Suit NO.243 of 1979 in the court of Joint Civil Judge, S.D., Satara and prayed for declaration and salary for the period from 1-1-1978 to 17-6-1979. The suit was decreed in his favour. Being aggrieved by the said decision the management preferred first Appeal No.140 of 1983. When the said appeal was pending the Petitioners decided to hold enquiry against the Respondent no.1. and issued charge sheet dated 1-2-1985 to him. He was charged for not discharging his duties as a teacher as per Rule 22 Schedule I as well as for misconduct and remaining absent from duty from 29-12-1983 without permission. After completion of enquiry the services of Respondent no.1 were terminated by an order dated 12-2-1987. It was informed to him that as he remained absent with effect from 29-12-1983 for a period for more than 3 years, as per Rule 16(3) of the Maharashtra Employees of Private Schools (condition of service) Regulation Act, 1977 (hereafter referred to as the said MEPS Act), it was presumed that he has voluntarily abandoned the services.

4. Being aggrieved by the said termination order the Respondent no.1 filed Appeal NO.22 of 1987 under Section 9(1) of MEPS Act. The said appeal was allowed by the Presiding Officer, School Tribunal, Pune Region, Pune and order of termination dated 12-2-1987 was quashed and set aside and it was declared that the Appellant continues in the employment of Petitioners with all consequential benefits.

5. Being aggrieved by the above mentioned order the Petitioners filed the present writ petition. According to the Petitioners the enquiry conducted by them against Respondent no.1 was legal and valid and Respondent no.1’s services were rightly terminated by virtue of order dated 12-2-1987. However, the Presiding Officer school Tribunal, Pune Region, wrongly held that the said order of termination was not legal and valid and quashed the same. the Petitioners have therefore prayed that as the order passed by the Presiding Officer in the above mentioned Appeal No.22 of 1987 is not legal and same be quashed. According to them, proper enquiry committee was appointed to hold the enquiry against the Respondent no.1. As he had remained absent from duty without permission from 24-12-1983 for a period of more than 3 years, in view of Rule 16(3) of the said Rule, management presumed that Respondent no.1 has voluntarily abandoned his services management took decision and informed him vide their letter dated 12-2-1987 that in view of above position he

should note that his right to remain in service has come to an end.

6. On 1-7-1994 this Court directed to issue notice before admission to Respondent no.1, returnable after 15 days. The Court also directed that pending hearing and final disposal of the petition, operation and execution of the order passed by the Presiding Officer of School Tribunal, Pune on 8-9-1993 is stayed.

7. Respondent no.1 filed affidavit in reply and opposed the admission of the petition and contended that enquiry committee appointed by the Petitioners was comprised of Mr.G.L.Ainapure and Mr.N.G.Gaikwad and he was not given an opportunity to defend his case before the enquiry committee. There was litigation between Respondent no.1 and Ainapure with regard to inter se seniority and as such the said Shri G.L.Ainapure had grievance against him and he was biased and prejudiced. Besides this other member appointed should have been from amongst the employees of the private schools. However, the second member of the enquiry committee was in the employment of Zilla Parishad, School. Thus, according to Respondent no.1 the enquiry committee was illegal, the procedure adopted by the committee was also not proper and no opportunity was given to him to defend his case. Respondent no.1 further contended that Regular Civil Suit No.243 of 1979 was decided in his favour and he was allowed to resume his

duties on Venna Vidya mandir with effect from 29-12-1983. However, thereafter he was not allowed to work because of pendency of the appeal No.140 of 1983. According to him as per directions of the School Tribunal, he is entitled to get back-wages, so there is no necessity to interfere with the order passed by the Presiding Officer, School Tribunal, Pune. Respondent no.1 therefore prayed for dismissal of the petition.

8. On 20-12-1994 this Court issued Rule and continued interim relief in terms of prayer clause (c).

9. Shri Dalvi, learned Advocate for the Petitioner submitted that in this case the letter dated 12-2-1987 issued by the Petitioner- Shri Swami Vivekanand Shiksan Sanstha to the Respondent no.1 is legal and correct and as Respondent no.1 remained absent from his duty with effect from 29-12-1983 continuously for a period of 3 years without obtaining any leave and without giving any justifiable reason, as per Rule 16(3) of MEPS Rules the Respondent no.1 has abandoned his service and thus it has come to an end. As against this Shri Salvi, learned Advocate for the Respondent no.1 submitted that in the instant case when Departmental Enquiry was initiated against Respondent no.1 wherein also it was mentioned that Respondent no.1 has remained absent without permission from 29-12-1983. The period of 3 years was in fact not over when charge in that behalf was kept on the Respondent

and as such Rule 16(3) of the said MEPS Rules is not applicable in the instant case.

10. Before actually assessing the material on record it is worthwhile to see what Rule 16(3) says. It runs as follows :

> 16(3)In the case of a permanent employee who, without sufficient cause, fails to apply for leave within 7 days from the date of absence, it shall be treated as breach of disciplined and he shall be liable for suitable disciplinary action after due inquiry. A permanent employee who is absent from duty without leave continuously for a period excluding three years or more, shall be deemed to have voluntarily abandoned his services."

11. In order to decide this petition correctly we have to find out whether the Respondent no.1 has in fact abandoned his service. Naturaly, the question may arises what is meant by the abandonment of service. Rule 16(3) inf act says that if a person remained absent continuously for a period of more than 3 years without prior permission and without leave then it amounts to abandonment of service. In **Buckingham and Carnatic Co Ltd. V Venkatiah AIR 1964 SC 1272.** Their Lordships have observed :

" It is true that under common law an inference of relinquishment of service is not easily drawn unless from the length of absence and other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that an employee intended to abandon service. This normally requires adequate evidence in support of this contention. But where the circumstances in which such an inference should be drawn are agreed and laid down in certified standing orders, the doctrine of common law or considerations of equity would not apply and in such cases where the conditions mentioned in the standing orders are fulfilled, the employee will be deemed to have terminated his contract of employment and thus relinquished or abandoned his employment."

12. In another case **G.T.Lad V Chemical and Fibres of India Ltd. AIR 1979 SC 582,** the apex Court has held :

" to constitute abandonment of service, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. Abandonment or relinquishment of service is always a question of intention and normally such an intention cannot be attributed to an employee without adequate evidence in that behalf. It is a question of fact to

be determined in the light of the surrounding circumstances of each case."

13. It is an admitted fact that on the day when charge sheet was issued to Respondent no.1, the alleged period of absence was not of 3 years. So, on that day, the Rule 16(3) MEPS Rule was not applicable. However, the main question is whether in the charge sheet it was stated that Respondent no.1’s services are liable to be terminated or that they have came to an end as a result of Rule 16(3) of MEPS Rules. If we carefully read the charges levelled against the Respondent no.1 in the charge sheet it is quite evident that all that was informed to respondent by the said charge was that he has remained absent from duty from 29-12-1983 continuously without permission or without obtaining leave. It was not at all specifically mentioned in the said charge that Rule 16(3) is applicable to him. So, it is in fact not necessary for us to consider whether the period of 3 years was over on the day when the charge sheet was issued against Respondent no.1. On the contrary what is to be seen is whether period of 3 years of remaining absent from duty without permission or without obtaining leave was over on the day when the Respondent was informed that he has remained absent from duty continuously for a period of more than 3 years and as such the Society has presumed that Respondent has abandoned his service is correct or not. It must be noted that this

letter is admittedly dated 12-2-1987. Firstly, it must be noted that after receipt of this letter the Respondent no.1 has not written even a single letter to the Petitioner Society, that contents of the said letter are incorrect or that he was in actual service during period of 3 years immediately preceding the letter dated 12-2-1987.

14. It is the contention of the Respondent no.1 that he resumed the duty in the school as per letter received from the Petitioner institution on 8-4-1983 and on 29-12-1983, the management suddenly prevented him from signing the muster but even then he was regularly attending his duties **till end of January 1984** (emphasis is mine). It is pertinent to note that even according to the Respondent he continued the service only till the end of January 1984. If really he was attending the school or had gone to the school even thereafter till the year 1987 when the letter dated 12-2-1987 was issued to him, then certainly, he would not have failed to mention accordingly in his correspondence and in particular by giving reply to that effect to the institution. But that has not happened. So, this conduct of Respondent no.1 clearly indicates that during period 1-2-1984 to 12-2-1987 he was not actually attending the school. If really he had gone to the school and Petitioner institution had obstructed him from signing muster, then certainly, he would have moved the trial court which had in fact given decision by that time in his

favour that he is entitled for salary and he is in service. Besides this, if really he would not have received salary since 1-2-1984 then also he would not have kept mum for 3 years but we find that during this period of 3 years or so the Respondent no.1 neither moved the concerned authority of the school or the civil court or the School Tribunal and informed them that he is attending the school but the Petitioner institution is wrongly restraining him from signing muster and not paying his monthly salary.

15. I have carefully gone through the appeal memo filed by the Respondent in the School Tribunal against the Petitioner's order or letter dated 12-2-1987. It is pertinent to note that even in the entire appeal memo which is filed by him, he has nowhere specifically averred that he was actually attending the duty or used to go to the school during the period 1-2-1984 to 12-2-1987 but the Petitioner institution did not allow him to sign the muster etc. On the contrary, if we peruse the entire appeal memo filed by the Respondent no.1 and read between the lines then also it is crystal clear that all that he conveyed in the said appeal memo is that as the Petitioner institution has paid him salary for the period ending January 1984 their contention that he was absent from duty from 29-12-1983 is not correct. But, it is worth to note that it is not specifically contended by him that after January 1984 he was actually attending the duty or that it

cannot be said that he continuously remained absent without prior permission or without any justifiable cause.

16. The conduct of the Respondent after 1-2-1984 leaves no manner of doubt to indicate that since that date he did not actually resume the duty and had in fact remained absent without prior permission. It is only when the Petitioner issued letter dated 12-2-1987 then he approached the school tribunal and took a stand that he was attending the duty but the Petitioner institution did not allow him to sign the muster. At the cost of repetition, it must be said that he has not specifically contended that after 1-2-1984 he was actually attending the school. So, the contention of the Respondent no.1 that he was not absent for a period of 3 years immediately prior to letter dated 12-2-1987 cannot be accepted.

17. It is only when specific query was made the Respondent no.1 at the last hour filed one affidavit dated 24-11-1995. However, even in this affidavit also he has in fact categorically and in clear terms stated that he was not absent from duty immediately preceding 3 years and he was actually attending the duty during the period 1-2-1984 to 12-2-1987. He has made reference of some letters written to the management and Education Minister dated 2-1-1984 and 31-12-1983 respectively. However, as both those letters are of the date prior to 1-2-1984 the same need not be considered. Copies of those 2 letters

mentioned in his affidavit - para 5 are also not produced. So, I have absolutely no hesitation to hold that the Respondent no.1 has remained absent continuously for more than 3 years without permission and without taking any leave. So, naturally Rule 16(3) of MEPS Rule is applicable to him and letter issued dated 12-2-1987 is legal and correct.

18. A question may arise as to whether for the application of Rule 16(3) of MEPS rule, it is necessary for the employer to hold Departmental Enquiry or to give an opportunity to the employee. However, it is worth to note that if really the legislature had such an intention then they would have mentioned accordingly in first part of Rule 16(3) but we find that it is not mentioned accordingly and on the contrary this provision with regard to abandonment has been made in the later part. Besides this, we cannot ignore the fact that even after receipt of the letter dated 12-2-1987 the Respondent no.1 could have agitated and could have shown- the employer, that there was justifiable cause for not attending the duty or that circumstances are such that it cannot be said that he was absent from duty. Neither of these things have happened. So, we cannot jump to the conclusion that Rule 16(3) is not applicable in the instant case.

19. It is true that Petitioner Institution had initiated Departmental Enquiry against Respondent No.1 in which they

had specifically averred that Respondent no.1 remained absent from duty from 29-12-1983. However if we carefully read Rule 36 regarding holding the Departmental Enquiry and constitution of enquiry committee then it does appear that committee constituted by the Petitioner was consisting of one member by name Ainapure against whom in fact the Respondent no.1 employee had filed a writ petition. So, such person should not have been the member of the enquiry committee and to that extent the committee constituted by the employer cannot be said to be proper. Naturally, the enquiry held by such committee cannot be held to be just and proper. The view taken by the School Tribunal in that behalf is correct. However the finding of the School Tribunal that Rule 36(3) is not applicable to the instant case is certainly not legal and correct particularly when there is sufficient material on record to show that Respondent no.1 has in fact remained absent from duty for a period of more than 3 years and the Respondent has nowhere specifically and clearly proved that he was not absent accordingly. Merely at late stage saying that besides his service as teacher he was not doing any other job etc. is of no use.

20. Considering the material on record and having regard to the conduct of the Respondent no.1, I have no hesitation to accept the version of the Petitioner -Institution that Respondent no.1 remained absent from duty for a period of more than 3 years continuously

without sufficient reason immediately preceding the letter dated 12-2-1987 and as such it has to be held that Respondent no.1 has abandoned his service.

21. In this view of the matter the Rule is made absolute. Petition is allowed and the order passed by the School Tribunal, Pune is set aside.

(S.R.SATHE,J.)